Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

SANDRA LEIGH STIMPSON,

Petitioner,

v.

CITY OF TUSCALOOSA, J. RUSSELL GIBSON, in his official capacity as member of the Tuscaloosa Civil Service Board; BILL DELOACH, in his official capacity as member of the Tuscaloosa Civil Service Board; RON TURNER, in his official capacity as member of the Tuscaloosa Civil Service Board,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SAMUEL FISHER
Counsel of Record
JOEL S. ISENBERG
KIMBERLY C. PAGE
Attorneys for Petitioner
1400 Southtrust Tower
Birmingham, AL 35203-3204
(205) 328-0640

157441

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

58pp

QUESTIONS PRESENTED

1. In determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 50, should a district court weigh all of the evidence or consider only the evidence favoring the non-movant?

2. Under Title VII of the Civil Rights Act of 1964, as amended, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer, or is proof of pretext enough in a circumstantial case to present the case to the jury?

3. Is the Seventh Amendment violated when an appellate court reverses a jury verdict and directs entry of judgment using a standard of law upon which the jury was never instructed, rather than remanding the case for a new trial so that a jury could receive and weigh evidence in light of the new standard?

Because the first and second questions presented above are nearly identical to issues presently pending before this Court in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 99-536, the Petitioner asks that her Petition for Writ of Certiorari be granted. In the alternative, the Petitioner asks that her Petition for Writ of Certiorari be held and granted and that the case be remanded in light of the Court's opinion in *Reeves.*

Though not identical, the third question presented above is similar to an issue presently pending before this Court in the case of *Weisgram v. Marley Company, et al.*, 99-161. Therefore, the Petitioner asks that her Petition for Writ of Certiorari be granted. In the alternative, the Petitioner asks that her Petition for Writ of Certiorari be held and granted and that the case be remanded in light of the Court's opinion in *Weisgram.*

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision, Statute and Rule Involved	1
Statement of the Case	2
Statement of Facts	5
Reasons for Granting the Writ	10
I. The Eleventh Circuit's Standard For Weighing All Of The Evidence In Considering A Motion Under Rule 50 Is Identical To The Standard Of The Fifth Circuit At Issue In *Reeves v. Sanderson Plumbing Products, Inc.* Presently Pending Before This Court.	10

Contents

Page

II. The Eleventh Circuit's Weighing Of All The Evidence Under Rule 50 Is Inconsistent With The Approach Of Other Circuits Which Consider Only The Evidence Favoring The Non-Movant. 12

III. The Eleventh Circuit Panel Impermissibly Required Stimpson To Prove Discriminatory Animus Directly, In That It Reversed The Verdict Even Though The Jury Inferred Discrimination From The Discredited Explanation Proffered By The Decision Maker. 14

IV. The Eleventh Circuit Violated The Seventh Amendment By Reversing A Jury Verdict And Directing Entry Of Judgment Using A Standard Of Law Upon Which The Jury Was Never Instructed, Rather Than Remanding The Case For A New Trial. 18

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Arenson v. Southern Univ. Law Ctr., 911 F.2d 1124 (5th Cir. 1990), *cert. denied*, 499 U.S. 949 (1991) 23

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) 10, 11, 12, 14

Bonner v. City of Pritchard, 661 F.2d 1209 (11th Cir. 1981) 11

Casko v. Elgin, Joliet and Eastern Ry. Co., 361 F.2d 748 (7th Cir. 1966) 14

Clover v. Total System Serv., Inc., 176 F.3d 1346 (11th Cir. 1999) 25

Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998) 15, 16, 18, 25

CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 46 F.3d 1211 (1st Cir. 1995) 14

DeMarco v. United States, 415 U.S. 449 (1974) .. 20

Dimick v. Schiedt, 293 U.S. 474 (1935) 26, 27, 30

Gallo v. Prudential Residential Services, 22 F.3d 1219 (2nd Cir. 1994) 15

Cited Authorities

Page

Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931) 30

Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 28, 29

Hetzel v. Prince William County, 118 S. Ct. 1210 (1998) 28

Icicle Seafoods, Inc. v. Worthinton, 475 U.S. 709 (1986) 23

Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844 (1982) 20

Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir.1996), *cert. denied*, 521 U.S. 1119 (1997) 15, 16, 17, 18

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 27, 28, 29

Kingston v. McGrath, 232 F.2d 495 (9th Cir. 1956) 14

Kramer v. Logan County Sch. Dist., 157 F.3d 620 (8th Cir. 1998) 21

Lehman v. Trout, 465 U.S. 1056 (1984) 23

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122 (1st Cir. 1997) 22

Cited Authorities

Page

Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236 (11th Cir. 1998), *cert. denied*, 120 S. Ct. 327 (1999) 19

Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996) 21

Lyons v. J.C. Penny Co., 316 F.2d 753 (7th Cir. 1963) 14

MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991) 12

Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999) 25

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 20, 23, 29

Reeves v. Sanderson Plumbing Products, Inc., 99-536 i

Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688 (5th Cir.), *cert. granted*, __ U.S. __, 120 S. Ct. 444 (1999) 10, 11, 12, 13, 14, 15, 16, 18, 30

Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967) 14

Cited Authorities

Page

Slocum v. New York Life Insurance Co., 228 U.S. 364 (1913) 26, 29

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 14, 15, 17

Sullivan v. National R.R. Passenger Corp., 170 F.3d 1056 (11th Cir.), *cert. denied*, 120 S. Ct. 402 (1999) 25

Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995) 15

Van Houdnos v. Evans, 807 F.2d 648 (7th Cir. 1986) 23

Venture Technology, Inc. v. National Fuel Gas Distribution Corp., 459 U.S. 1007 (1982) 18

Verbraeken v. Westinghouse Electric Corp., 881 F.2d 1041 (11th Cir. 1989), *cert. denied*, 493 U.S. 1064 (1990) 12

Walker v. NationsBank of Florida, 53 F.3d 1548 (11th Cir. 1995) 12

Walls v. Button Gwinnett Bancorp, Inc., 1 F.3d 1198 (11th Cir. 1993) 11, 12

Weisgram v. Marley Company, et al., 99-161 ..... i, 30

Cited Authorities

Page

Wilson v. S&L Acquisition Co., L.P., 940 F.2d 1429 (11th Cir. 1991) 12

Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) 15

Young v. Central R.R. Co., 232 U.S. 602 (1914) .. 21

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 5

42 U.S.C. § 1981 23

42 U.S.C. § 1981a 4

42 U.S.C. § 1981a(c)(1) 24

42 U.S.C. § 2000e, *et seq.* 1

42 U.S.C. § 2000e-2(a) 1

42 U.S.C. § 2000e-2(a)(1) 1, 19

United States Constitution:

Seventh Amendment .....i, 2, 18, 26, 28, 29

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 19 3

Fed. R. Civ. P. 50 ..... i, 2, 4, 5, 10, 11, 14, 16

Other Authorities:

H.R. Rep. No. 102-40(I), 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 24

Robert L. Stern *et al.*, *Supreme Court Practice* § 4.16 (7th ed. 1993) 12

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed August 30, 1999 ..... 1a

Appendix B — Final Judgment And Permanent Injunction Of The United States District Court For The Northern District Of Alabama, Western Division Dated And Filed January 28, 1998 .... 10a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Motion For Damages And Granting Motion For Attorney Fees Dated And Filed August 30, 1999 ..... 13a

Appendix D — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed October 27, 1999 ..... 14a

OPINIONS BELOW

Following a jury verdict in favor of Petitioner, the United States District Court for the Northern District of Alabama issued a Final Judgment and Permanent Injunction on January 28, 1998, which is unreported and attached in Appendix B. The Opinion of the Court of Appeals for the Eleventh Circuit reversing the District Court's Final Judgment and remanding the case back with instructions to enter judgment in favor of Respondents, issued on August 30, 1999, is reported as *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999), and reproduced in Appendix A. Also, on August 30, 1999, the Eleventh Circuit Court of Appeals issued an Order granting Respondents' Motion for Attorney's Fees on Petitioner's Cross Appeal. This Order is unreported, and is reproduced in Appendix C. The Eleventh Circuit Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Hearing *En Banc*, without opinion, on October 27, 1999, and that decision is reproduced in Appendix D.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit entered on August 30, 1999, Petition for Rehearing En Banc denied on October 27, 1999, by Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* 42 U.S.C. § 2000e-2(a) provides, in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1).

The Seventh Amendment to the United States Constitution provides "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by the jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Federal Rule of Civil Procedure 50 provides, in pertinent part:

> (a) **Judgment as a Matter of Law.**
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . .
>
> (b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject tot he court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for new trial under Rule 59. . . .

STATEMENT OF THE CASE

On March 9, 1995, Petitioner Sandra Stimpson (hereinafter "Stimpson") filed a complaint in the United States District Court for the Northern District of Alabama naming the City of Tuscaloosa (hereinafter "City") as defendant. R-1-1. On April 7, 1995, Stimpson filed with the district court a Motion to Amend Complaint which was granted on April 13, 1995. R-1-2. On May

19, 1995, the City filed a Motion to Dismiss in which it argued that Stimpson failed to join the Civil Service Board of Tuscaloosa (hereinafter "Board") as a defendant. R-1-4. According to the City, Stimpson's complaint was due to be dismissed because the Board was an "indispensable party" to this litigation. *Id.* On May 23, 1995, the district court overruled the City's motion without prejudice.

On August 7, 1995, Stimpson filed a second Motion to Amend Complaint, which was granted on August 8, 1995. R-1-8. On August 9, 1995, Stimpson filed a Second Amended Complaint, adding Chief of Police Ken W. Swindle, Assistant Chief of Police William Wilkins and the members of the Board in their official capacities as defendants. R-1-10.

Defendants Gibson, DeLoach and Turner (the individual members of the Board) filed a Motion to Dismiss on August 18, 1995. R-1-12. On November 22, 1995, defendants Gibson, DeLoach and Turner filed a Motion for Summary Judgment. R-1-21. On December 27, 1995, the district court granted the Motion to Dismiss filed by Gibson, DeLoach and Turner, and, on January 6, 1996, the district court granted the Motion for Summary Judgment filed by Gibson, DeLoach and Turner. R-1-12; R-1-21.

On January 8, 1996, Stimpson filed a Motion to Join the Civil Service Board as a Rule 19 Defendant. R-1-26. Neither the City nor the Board filed an opposition to Stimpson's Motion. On January 11, 1996, the district court granted Stimpson's Motion to Join the Civil Service Board as a Rule 19 defendant. *Id.*

A three-day jury trial was held on Stimpson's sex discrimination claims against the City of Tuscaloosa. R2-67.[1] The City moved for judgment as a matter of law at the close of Stimpson's case. The district court granted the motion in part, dismissing the sexual harassment claim, and denying the motion with respect to Stimpson's sex discrimination claim. R7-85; R8-599-600. Stimpson moved for judgment as a matter of law after the close of Respondent's case, and, while the district court

1. As the Civil Service Board was only a defendant under Rule 19 for remedial purposes, the issue of its liability was not addressed at the trial.

ultimately decided not to direct a verdict for Stimpson because of the jury verdict in her favor, the district court noted that it considered Stimpson's evidence so strong that it should direct a verdict *in favor of Stimpson*:

> THE COURT: All right. I am going to not deny the plaintiff's motion for a directed verdict. Frankly I think it should be granted, but —
>
> MR. FISHER: Judge —
>
> THE COURT: But I'm not going to grant it at this point.

(R-9-754). The jury returned a verdict for Stimpson, finding that the City discriminated against her in recommending and prosecuting her discharge before the Civil Service Board, and awarded her $500,000 in compensatory damages. R7-86. The district court reduced the award to $300,000, the appropriate damages cap pursuant to 42 U.S.C. § 1981a. R7-88; R9-851. On January 28, 1998, the district court entered a Final Judgment and Permanent Injunction in accordance with the jury's verdict. On February 3, 1998, Respondents filed a Renewed Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50, which the district court denied. R7-91,95.

On February 18, 1998, Respondents filed a Notice of Appeal, which they subsequently amended several times. R5-107;-113; -117. On March 2, Stimpson filed a Notice of Appeal, which was intended to be a cross-appeal, appealing from: (a) the December 29, 1995, interlocutory order dismissing the Board members; and (b) the January 6, 1996, interlocutory order granting the Board members motion for judgment, which became final January 29, 1998. R5-110.

On August 30, 1999, the Eleventh Circuit entered an Order: (a) vacating the jury verdict and remanding the case back to the district court with instructions to enter judgment in favor of Respondents; and (b) awarding attorneys' fees to the Board with regard to Stimpson's cross-appeal, which it found to be moot. The panel did not reach any of the sixteen (16) other grounds for

reversal raised by Respondents. The panel held that Respondents were entitled to judgment as a matter of law under Federal Rule of Civil Procedure 50 because Stimpson failed to produce evidence sufficient to prove that the City's discriminatory animus infected the Board's ultimate decision to discharge her, and thus there was insufficient evidence to present the case to the jury.

Jurisdiction in the Eleventh Circuit Court of Appeals was pursuant to 28 U.S.C. § 1291, as this was an appeal from the district court's final judgment.

STATEMENT OF FACTS

Petitioner Sandra Leigh Stimpson was an officer who served with distinction in the City of Tuscaloosa Police Department for eighteen years. When she was hired by the Department in 1975, Stimpson was only the third woman ever hired to be a police officer by the City. (R7-91) During her eighteen year career, Stimpson received more commendations and honors than any other officer on the force. (R8-402; *see* Pl.Tr.Exh.2-8) Stimpson was the first female sharpshooter to finish the Tuscaloosa Police Academy, and proved herself to be a skilled marksman and shooting instructor. (Pl.Tr.Exh.3)[2]

In October of 1992, Chief of Police Ken Swindle and Assistant Chief Billy Wilkins called Stimpson into Swindle's office and ejected her from the force. (R7-140-42) Stimpson testified:

> Then [Chief Swindle] said, "Do you want to resign?" I said, "No, sir." He, uh, pointed to Captain Robertson and said, "Get her — escort her — or get someone to escort her down to her locker." And he pointed to me. And he said, "Get everything you own. Get out of this Police Department. Get your car and don't set your foot back in here again."

(*Id.*).

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2. On appeal to the Eleventh Circuit, the respondents attempted to portray Stimpson as an unsatisfactory police officer. This portrayal was rejected by the jury. In error, the Eleventh Circuit adopted wholesale the facts as presented by Respondents, the "moving parties." There is no better illustration of the miscarriage of justice that can, and does, occur as a result of the current standard for Rule 50 in the Eleventh Circuit.

After Stimpson refused to resign, Chief Swindle, acting on behalf of the City, recommended to the Tuscaloosa Civil Service Board that Stimpson should be officially discharged. This was an unprecedented action by the City. Swindle testified that he had never brought charges seeking discharge against any male officer. (R8-303) Swindle first testified that he had never sought a male officer's discharge before the Board because the male officers all had been offered the chance to resign in lieu of having charges brought against them. *Id.* at 304. Swindle further testified that he offered Stimpson the same option, but that she refused; therefore, he sought her discharge from the Board.[3]

Swindle's direct testimony did not stand up on cross-examination. The jury learned that he only recalled one example of a male officer who he asked to resign, and that particular officer, Captain J.W. Jones, remained on the force without being brought before the Board. Jones was guilty of gross misconduct involving homosexual liaisons with youthful civilians on the Department's firing range while on duty. Swindle did not seek his discharge before the Board even though he refused to resign:

> Q. (Mr. Fisher): You recall Captain Jones, and you recall the offense, don't you?
>
> A. (Chief Swindle): Yes, sir.
>
> Q. All right. And you claim that you offered him resignation, am I correct?
>
> A. Yes, sir.

---

3. Chief Swindle singled out Stimpson in other ways. Swindle handled the cases of the male officers differently, including male officers who were guilty of misconduct far more serious than that of which Stimpson was accused. When he offered the male officers the option to resign in lieu of termination, he had not created a written record stating that he was going to file charges against them with the Board. *Id.* at 305. By contrast, Swindle testified that, at the time he offered Stimpson the option to resign, he had already typed and presented to her a letter informing her that she was being discharged. (R8-304)

Q. And in fact, he refused to resign, didn't he?

A. Yes, sir.

Q. Let me back up. You offered him resignation in lieu of filing charges for termination with the board, am I correct?

A. Yes, sir.

Q. He refused to resign.

A. That's correct.

Q. But you never filed charges before the board, did you?

A. No, sir.

(R8-305-15). Captain Jones had a history of offenses both before and after he refused to resign. Nonetheless, he remained on the force and was allowed to retire with full benefits.

Swindle's charges against Stimpson arose out of a series of events involving a minor problem she had with her wrist. On her way to work on Monday, August 31, 1992, Stimpson consulted Dr. Steven Ikard, an orthopedic surgeon, because she was experiencing discomfort in her wrist. (R7-101-102) Dr. Ikard determined that Stimpson was suffering from tendinitis. (R7-104) Dr. Ikard suggested that Stimpson wear a wrap around her wrist for approximately a week. (R7-102-103) Although she was not required to have one, Stimpson obtained a return to work slip from Dr. Ikard which released her to work without restriction. (R7-102-103)

Stimpson, whose shift began at 4:00 pm, reported to duty that afternoon wearing the wrap around her left wrist. (R7-103-107) Stimpson is right-handed, and holds her weapon in her right hand. (R7-196) She gave her commanding officer, Captain Ronnie Robertson, the return to work slip. (R7-105) Robertson accepted the return to work slip from Stimpson, who was wearing the wrap around her wrist in plain view, and nothing more was said that afternoon. (R7-107) Stimpson worked throughout the week with the wrap around her wrist, never missed work during this period of time, and had no difficulty performing her usual job duties,

including making traffic stops and responding to distress calls. (R7-110-112,118-119)

Despite the fact that Stimpson performed her job duties without incident, Assistant Chief Wilkins demanded more medical evidence on Friday afternoon, September 4, 1992.[4] Wilkins instructed Stimpson to go to a clinic, Emergi-Care. Chief Swindle had a long-standing relationship with Emergi-Care, and had been employed there as a security guard. (R7-249)

4. Apparently, Chief of Police Swindle, and Assistant Chief Wilkins suspected that Stimpson was going to try to test the City's light duty policy (or lack thereof). (R9-643) Stimpson had previously made complaints that all of the desk jobs, which might have been available for "light duty" use by injured workers, were occupied by women who had some "special relationship" with male supervisors in the Police Department. (R9-645). Less than one week before Stimpson arrived at work with the wrap around her wrist, a female coworker had sent a memo to Chief Swindle regarding a conversation she had had with Stimpson about possibly testing the light duty policy in the future. (Pl.Tr.Exh. 38). Despite the Chief's suspicions, however, Stimpson never requested light duty. (R9-645). Here again the Eleventh Circuit panel erred by viewing the facts in a light favorable to the defendant. The panel stated that Stimpson's "hand and wrist were immobilized in a splint" and thus her "superiors became concerned that her immobilized hand might hinder her ability to perform some of her official duties safely." App. A-3a. The jury understood, to the contrary, that Stimpson's hand and wrist were wrapped but *not* immobilized; that she provided a perfectly adequate medical release from her treating physician; that she performed all of her regular duties for a week before the chief sent her for a superfluous examination. The evidence showed, and the jury apparently found, that the Chief's concern was not safety, but his unfounded suspicion that Stimpson was preparing to challenge the department's practice in providing light duty. For another example, the panel stated, "Once in the doctor's office, [Stimpson] refused to cooperate with the nurse's initial examination and *threatened to sue the doctor*, Doctor Lovelady, if he contradicted Dr. Ikard's recommendation." App. A-4a. Stimpson testified that she never threatened Dr. Lovelady with a lawsuit. Dr. Lovelady's testimony was vague. (R8-441) The panel also made no reference in its opinion to the extensive evidence presented at trial in this sex discrimination case of the evidence of pretext with regard to the charges levied against Stimpson, or evidence of offenses by male police officers which were much more egregious than the accusation against Stimpson, and which did not result in dismissal, or even a recommendation of dismissal.

Swindle brought three charges against Stimpson on or about October 27, 1992 — two for insubordination and one for "conduct unbecoming an officer and a gentleman." (Pl.Tr.Exhs. 14-16). Each of the three charges was discredited at trial.

First, Chief Swindle charged Stimpson with insubordination for refusing to sign a medical release authorization presented to her by Assistant Chief Wilkins on September 2, 1992. (R8-288) On cross examination at trial, however, Wilkins testified that Stimpson was never ordered to sign the medical release and admitted that Stimpson could not have been "insubordinate" when she elected not to sign the release. (R9-584)

Second, Chief Swindle charged Stimpson with insubordination for refusing to have Dr. Ikard sign a new return-to-work form. (R8-289). This second charge of insubordination was completely discredited at trial. The second charge failed both because Stimpson never received an order to obtain a new return-to-work form, and because she provided one in any event. Wilkins testified that he *requested* Stimpson to have Dr. Ikard sign the return to work slip; thus, she could not have been "insubordinate" when she initially hesitated to go back to the doctor for another signature. (R9-594-595) Furthermore, she complied with Wilkins' request within three hours. (R9-586) Thus, Stimpson did as she was asked to do, and she was not insubordinate. (R9-586)

Third, Chief Swindle accused Stimpson of "conduct unbecoming an officer and a gentleman" based upon her language and attitude at the clinic. Swindle was able to convince the Civil Service Board to uphold his recommendation that Stimpson be fired on that basis. Swindle brought this charge against Stimpson because of her use of the words "bitchy" and "pissed off" at Emergi-Care. (R7-123-124)

Swindle and Assistant Chief Wilkins testified at trial that the Department has a progressive disciplinary policy, and that the discipline will become progressively more severe only if the employee engages in the same type of conduct. (R8-266-269) However, Stimpson was discharged for insubordination and "conduct unbecoming" despite the fact that she had not been

previously cited for this same conduct and neither of these was a "most serious" or terminable offense under the progressive discipline policy. (R9-645,646; Pl.Tr.Exh.23,40) By contrast, Stimpson introduced extensive evidence at trial of male police officers who used extreme profanity toward civilians while on duty, and who engaged in repeated "conduct unbecoming," but who were not terminated or recommended for discharge. (*See* Pl.Tr.Exh.26,27,35) Furthermore, Stimpson introduced evidence of a pattern of lenient discipline for males in the Police Department, which supports the jury's finding that the City's charges against her were simply a pretext for discrimination on the basis of her sex. (R7-297-355)

There was overwhelming evidence that the reasons proffered by the City for its recommendation and prosecution of Stimpson's discharge before the Board were contrived. The evidence further showed that the City not only recommended Stimpson's discharge, but, in the person of Chief Swindle, participated in the Board's termination procedures as an advocate for discharge. Nonetheless, the Eleventh Circuit held that, viewing all the evidence, Respondents' motion for judgment as a matter of law was due to be granted.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Standard For Weighing All Of The Evidence In Considering A Motion Under Rule 50 Is Identical To The Standard Of The Fifth Circuit At Issue In *Reeves v. Sanderson Plumbing Products, Inc.* Presently Pending Before This Court.

In the case of *Reeves v. Sanderson Plumbing Products, Inc.*, the Fifth Circuit Court of Appeals, having reviewed all of the evidence *de novo*, vacated a jury verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure and entered judgment as a matter of law for the defendant. In doing so, the Fifth Circuit applied the standard set forth in the case of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*), which provides that "On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence — not

just that evidence which supports the non-mover's case. . . ." *Shipman*, 411 F.2d at 376. This Court granted certiorari in *Reeves* on the issue of whether the Fifth Circuit's standard of weighing of all of the evidence, as set forth in *Shipman*, is the proper statement of the law as it conflicts with the standards of other circuits.

In the present case, the Eleventh Circuit vacated the jury verdict in favor of Stimpson and remanded the case to the district court with instructions to enter judgment for Respondents. In doing so, the Eleventh Circuit applied the standard of weighing all of the evidence set forth in *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198 (11th Cir. 1993). The Eleventh Circuit in *Walls*, in turn, had previously adopted the very same standard from *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*), which the Fifth Circuit in *Reeves* applied to reverse a jury verdict and render a contrary judgment.

In *Bonner v. City of Pritchard*, 661 F.2d 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. Thus, the binding precedent in the Eleventh Circuit, which is the same standard at as the Fifth Circuit's at issue in *Reeves* presently pending before this Court, provides:

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence — not just that evidence which supports the non-mover's case . . . If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper . . . there must be a conflict in substantial evidence to create a jury question. . . .

Shipman, 411 F.2d at 374-75. The Fifth Circuit's holding in *Shipman*, which is presently before this Court in *Reeves*, has been repeatedly cited as controlling by the Eleventh Circuit, and has been applied as the standard for reviewing motions under

Rule 50. *See, e.g., Walker v. NationsBank of Florida*, 53 F.3d 1548, 1555 (11th Cir. 1995); *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198, 1200 (11th Cir. 1993); *Wilson v. S&L Acquisition Co., L.P.*, 940 F.2d 1429, 1436 (11th Cir. 1991); *MacPherson v. University of Montevallo*, 922 F.2d 766, 770 (11th Cir. 1991); *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1044-45 (11th Cir. 1989), *cert. denied*, 493 U.S. 1064 (1990).

It is axiomatic that

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided. . . .

Robert L. Stern *et al.*, *Supreme Court Practice* § 4.16 at 192-93 (7th ed. 1993). Accordingly, because the issue in the present case is identical to that in *Reeves*, involving the identical case and the identical standard at issue in *Reeves*, certiorari is due to be granted.

II. The Eleventh Circuit's Weighing Of All The Evidence Under Rule 50 Is Inconsistent With The Approach Of Other Circuits Which Consider Only The Evidence Favoring The Non-Movant.

As discussed in Section I, *supra*, the Eleventh Circuit has adopted the Fifth Circuit's standard of reviewing all of the evidence under Rule 50 in *Shipman*.

Just as with regard to the Fifth Circuit in *Reeves*, the Eleventh Circuit's weighing of all of the evidence, instead of determining only whether the non-movant's evidence supports the jury verdict, is in direct conflict with the rules of other circuits. The Petitioner in *Reeves* aptly described the conflict in the circuits with regard to this issue as follows in its Petition for Writ of Certiorari:

Dissenting from this Court's denial of certiorari, Justice White described the conflict in the circuits as follows:

> [I]t is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the non-moving party. This is also the position of at least the Fifth and Seventh Circuits. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (CA 5 1969); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 281-82 (CA 7 1981). In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (CA 8 1967). The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. *Layne v. Vanzant*, 657 F.2d 468, 472 (CA 1 1981); *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33 (CA 3 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue.

Venture Technology, Inc. v. Nat'l Fuel Gas Distribution Corp., 459 U.S. 1007, 1009 (1982). *See also Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1993) (stating "Generally, only evidence favoring the non-moving party should be considered.")

Reeves Pet. Cert. at 8.

As noted above, the Eleventh Circuit's practice of examining all of the evidence, which practice was applied by the court below, is identical to the Fifth Circuit's practice cited in *Reeves*. And, numerous Courts of Appeals have rejected the Eleventh Circuit's consideration of all of the evidence, just as they have the Fifth Circuit's practice at issue in *Reeves*. These Courts of Appeals instead consider only the evidence that supports the non-movant.

See, e.g., CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 46 F.3d 1211, 1214 (1st Cir. 1995); *Casko v. Elgin, Joliet and Eastern Ry. Co.*, 361 F.2d 748, 749 (7th Cir. 1966); *Lyons v. J.C. Penny Co.*, 316 F.2d 753, 753-54 (7th Cir. 1963); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566-67 (8th Cir. 1967); *Kingston v. McGrath*, 232 F.2d 495, 497 (9th Cir. 1956); *see also* Judge Rivers' dissent in *Shipman*, 411 F.2d at 381-82 (5th Cir. 1969) (Rivers, J., dissenting) (consideration of **all** the evidence is inconsistent with this Court's precedents).

Had the Eleventh Circuit not applied *Shipman*, but had instead applied the standards for Rule 50 motions from the other circuits, then the Court of Appeals would not have reversed the jury verdict in favor of Stimpson and ordered a judgment in favor of Respondents.

III. The Eleventh Circuit Panel Impermissibly Required Stimpson To Prove Discriminatory Animus Directly, In That It Reversed The Verdict Even Though The Jury Inferred Discrimination From The Discredited Explanation Proffered By The Decision Maker.

Regarding the evidence necessary to create a factual issue under Title VII of the Civil Rights Act of 1964, this Court has stated: "[R]ejection of defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.' " *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

As the Petitioner in *Reeves* noted, "Some circuits hold the above language from *Hicks* means that proof of a *prima facie* case coupled with proof of pretext is always sufficient to present a jury question. Other circuits disagree, and require direct evidence of discriminatory intent." *Reeves* Pet. Cert. at 4. Along with the Fifth Circuit, the First and Fourth Circuits have adopted a "pretext plus" standard for determining the sufficiency of the evidence to present an employment discrimination case to the jury. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 197 F.3d 688 (5th Cir.),

cert. granted, __ U.S. __, 120 S. Ct. 444 (1999) (stating that, "[t]o establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination' had a determinative influence on' the employer's decision-making process"); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (stating that the Supreme Court in *Hicks* did not mean that a *prima facie* case plus proof of pretext was always sufficient to present a jury question); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) (stating that, to avoid summary judgment, a plaintiff must prove not only that the reason the employer articulated was false, but that discrimination was the real reason).

Other circuits, including at least one panel of the Eleventh Circuit Court of Appeals, have held that a *prima facie* case, plus evidence of pretext, is sufficient to create a jury question. *See, e.g., Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224-25 (2nd Cir. 1994) (stating that intentional age discrimination may be demonstrated by reliance on the evidence that established the *prima facie* case and proof of pretext without necessity for any additional evidence); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997) (stating that a plaintiff in a discrimination case can avoid summary judgment as a matter of law by proving a *prima facie* case and showing that the defendant's articulated reasons are pretextual), *cert. denied*, 522 U.S. 1045 (1998).

However, in addition to there being an inter-circuit conflict, the uncertainty regarding the "pretext-plus" issue has created an intra-circuit conflict in the Eleventh Circuit. There are two lines of cases in the Eleventh Circuit — those which adhere to the "pretext-plus" standard exemplified by *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir.1996), *cert. denied*, 521 U.S. 1119 (1997), and those which follow the later panel in *Combs*, which criticized and rejected *Isenbergh*. The standard set forth in *Isenbergh* is evocative of the Fifth Circuit's standard at issue in *Reeves*.

The *Stimpson* panel in the current case followed the *Isenbergh* rule, although it did not cite the *Isenbergh* opinion explicitly. According to Respondents and the Eleventh Circuit panel, Stimpson's success in proving that the reasons proffered for firing her were knowingly false does her no good, because proof of pretext is not enough of a basis for an inference of discrimination. The jury drew the inference that Respondents proffered a false explanation because Stimpson is a woman. Even though the jury found the reasons proffered to be pretextual, and even though the jury drew the inference from the pretext that the real reason was sex discrimination, the Eleventh Circuit panel held that more was required: "[W]e hold that Stimpson has failed to produce sufficient evidence to allow a reasonable jury to find causation between the City's alleged discriminatory animus and the Board's decision to fire her." App. A-9a. Thus, because the *Isenbergh* "pretext-plus" standard applied by the *Stimpson* panel is in direct conflict with the standard set forth in *Combs*, and is identical to the standard set forth in *Reeves*, if this Court in *Reeves* rejects the "pretext-plus" standard, the current *Stimpson* case is due to be reversed.

In *Reeves* (according to both the Petition for Certiorari and the Petitioner's brief), there are three questions presented. The first question addresses the so-called "pretext-plus" standard:

> Under the Age Discrimination in Employment Act,[5] is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

The above-quoted question addresses "pretext-plus" because it involves a determination of what evidence beyond evidence of pretext, if any, is needed to withstand a Rule 50 motion. The panel in the current case stated the City's proffered reasons for recommending termination of Stimpson as follows: "Based on her behavior at Emergi-Care coupled with her history of disciplinary problems, Chief Swindle recommended that she be terminated." App A-4a. The panel then set forth the Board's

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5. *Reeves* is an ADEA case; however, the "pretext-plus" question arises under Title VII and other anti-discrimination statutes.

identical proffered reasons: "On January 8, 1993, the Civil Service Board unanimously decided to terminate Stimpson based on her conduct surrounding the Emergi-Care incident, after also considering some of the most recent and egregious misconduct in her disciplinary record." App A-5a. It is clear that the jury rejected those reasons, and that there was sufficient evidence presented by Stimpson that justified the jury in rejecting them.

The Eleventh Circuit's requirement that Stimpson must directly link the animus to the pretext by some additional evidence is contrary to *Hicks*. *See Hicks*, 509 U.S. at 511 (holding that "rejection of defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . , upon such rejection, '[n]o additional proof of discrimination is required.' "). The Eleventh Circuit's reliance on the *Isenbergh* standard resulted in its decision to nullify the jury verdict by relying upon controversial and disputed testimony of Chief Swindle. According to Chief Swindle, in testimony which the jury rejected, the recommendation to terminate Stimpson's employment was similar to prior recommendations involving male officers. Specifically, the Eleventh Circuit justified its holding as follows (p.6, emphasis added):

> The Board, alone, has the power to terminate a police officer. Chief Swindle informed Stimpson that he intended to recommend her discharge to the Board. He offered her the chance to resign instead, *as he testified he had done with all of the other officers he had intended to refer to the Board for discharge.*

But, as noted *supra* pages 6-7, Chief Swindle's testimony was very much impeached. The jury rejected Chief Swindle's testimony. The rejection of his testimony was justified by the evidence presented on cross examination, which completely impeached Chief Swindle's efforts to place his recommendation on a sex-neutral basis. Therefore, the appellate panel had no authority to credit his testimony as a basis for its reversal of the verdict. An appellate court can reverse a verdict only if it relies upon "uncontradicted unimpeached evidence from disinterested

witnesses." *Venture Technology, Inc. v. National Fuel Gas Distribution Corp.*, 459 U.S. 1007, 1009 (1982). The testimony of Chief Swindle upon which the Eleventh Circuit relied was the opposite of "uncontradicted unimpeached evidence from disinterested witnesses." It was impeached on cross examination, and to call Chief Swindle "disinterested" begs the whole question.

If this Court finds in favor of the Petitioner in *Reeves*, then the intra-Circuit conflict in the Eleventh Circuit will have been resolved in favor of *Combs*, rather than *Isenbergh*. The panel in the current case followed the *Isenbergh* line, so the current case would then be due to be reversed, and the jury verdict restored.

IV. The Eleventh Circuit Violated The Seventh Amendment By Reversing A Jury Verdict And Directing Entry Of Judgment Using A Standard Of Law Upon Which The Jury Was Never Instructed, Rather Than Remanding The Case For A New Trial.

It is clear from the record that the legal standard applied by the Eleventh Circuit to evaluate the sufficiency of the evidence is significantly different than the legal standard applied by the jury in finding liability on the part of the City. Upon determining that the legal standard under which the case should have been decided was not used by the district court, the only proper action was for the Eleventh Circuit to reverse and remand the case for a new trial. Instead, the Eleventh Circuit itself applied a new legal standard to the facts before it, weighed the evidence in the record, and remanded the case back for entry of judgment for Respondents. In doing so, the Eleventh Circuit violated this Court's precedents and the Seventh Amendment to the United States Constitution.

In order to preserve inviolate the distinction between the power of the court and that of the factfinder, the Supreme Court must grant certiorari to direct the Eleventh Circuit that, when it adopts a new or different legal standard than that used by the district court, the case must be remanded so that a complete record can be developed on the issue and the proper entity — the jury — is given the opportunity to exercise its role as factfinder in the first instance.

The Eleventh Circuit held that the proper standard for determining the City's liability, if any, centered on the issue of whether the City's discriminatory animus influenced the Board's decision to terminate Stimpson. In other words, was the Board acting merely as a "cat's paw" or "rubber stamp" for the City's discriminatory recommendation?[6] App. A-8a. The jury did not evaluate the evidence before it according to the legal standard adopted by the Eleventh Circuit. The district court instructed the jury as follows regarding the legal standards under which to evaluate the evidence:

> [THE COURT]: As I have said, the plaintiff has the burden of proving that the defendant intentionally discriminated against her because of her sex. That is the first element of her burden of proof. In determining whether the plaintiff has carried that burden, your job is to decide just what motivated the Tuscaloosa Police Department to recommend that the plaintiff be discharged. And if you find that the plaintiff's sex was a motivating factor, that it did make a difference, then the plaintiff would have

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6. The Eleventh Circuit adopted the following standard:

> In order to prove intentional discrimination under [42 U.S.C. § 2000(e)-2(a)(1)], a plaintiff must establish (1) the employer's discriminatory animus towards the employee based on the employee's protected characteristic; (2) a discharge or other significant change in the terms or conditions of employment; and (3) a causal link between the two.

App. A-6a-7a. The Eleventh Circuit cites to its prior decision in *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998), *cert. denied*, 120 S. Ct. 327 (1999), for the three prongs to be proven by Stimpson. However, in so doing, the Eleventh Circuit imposed a more stringent standard than its previous decision, as the second prong in *Llampallas* only required the plaintiff to show "an alteration in the terms and conditions of his employment by the employer" not "a discharge or other significant change in the terms or conditions of employment" as required in *Stimpson*. *Compare Llampallas*, 163 F.3d at 1245 *with* App. A-6a-7a

> carried her burden of proof on the first element of her claim.

R9-836-839.[7]

After deliberating, the jury returned with the following unanimous verdict:

> We, the jury, find in favor of the plaintiff, Sandra Leigh Stimpson, and against the defendant, City of Tuscaloosa, and award compensatory damages in the amount of $500,000.00

R9-845.

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court held:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the missing findings:
>
> > [F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . The Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.

Id. at 291-292 (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n. 39 (1974)).[8]

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7. The court further instructed the jury regarding the issue of damages and instructed the jury to complete one of two general verdict forms depending upon whether the verdict was in favor of the City or Stimpson. R9-839-843.

8. *See also Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 858 n. 19 (1982) (on appeal, the appellate court took judicial notice of facts that were not available to the district court; the Supreme Court found this improper and held "even if the District Court failed to consider relevant evidence, which would have been an error of law, the Court of Appeals, rather than make its own factual determination, should have remanded for further proceedings to

(Cont'd)

Instead of adhering to the requirements of the Constitution and this Court's mandate, the Eleventh Circuit panel undertook an independent review of the record to make its own factual findings regarding the "independence" of the Respondents.[9] Once the Eleventh Circuit proceeded to evaluate the evidence presented at trial according to its view of the proper legal standard instead of ending its review and remanding for a new trial, the *Stimpson* court entered forbidden territory properly reserved for the trier of fact. In its role as factfinder, the Eleventh Circuit weighed the evidence before it and determined that no reasonable juror could conclude that the City could be held liable for recommending Stimpson's discharge because it found it "hard to imagine any other procedural device that would ensure a more fair and independent investigation than that of the Civil Service Board."

(Cont'd)

allow the trial court to consider the evidence"); *Young v. Central R.R. Co.*, 232 U.S. 602, 603-04 (1914) (court of appeals held that district court erred in submitting case to the jury and remanded with directions to enter judgment for the defendant; after granting certiorari, the Supreme Court affirmed the appellate court's reversal, but violated the right to a jury trial by directing judgment for the defendant and held that the case should be "remanded to the trial court with directions to set aside its judgment and grant a new trial").

9. Other circuits have held that the question of whether the Board's decision to terminate Stimpson was independent and unaffected by the City's discriminatory animus is unmistakenly a question for the jury. *See, e.g., Kramer v. Logan County Sch. Dist.*, 157 F.3d 620, 624-25 (8th Cir. 1998) (Eighth Circuit rejected defendants argument that issue of independent investigation was properly resolved as a matter of law; "school district argues that this case is distinguishable because the school board conducted an independent fact-finding hearing . . . Even more troubling is that Kramer, who was represented by counsel at the hearing, did not present any evidence of, nor even mention, her allegations of gender discrimination. Yet, these concerns involve credibility determination which we do not consider when review a motion for judgment as a matter of law."); *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) ("degree to which Aguero's decisions were based on his own independent investigation is a question of fact which has yet to be resolved at the district court level . . . we must assume on a peal that Aguero merely 'rubber stamped' the recommendation of Clark and Kelley").

App. A-9a. The Eleventh Circuit based its determination that the Board conducted an independent investigation on the text of the State law creating the Board and the "cold paper record" of the decision of the Board.[10] However, the Eleventh Circuit did not even take into account that the record on this factual issue was not entirely complete, which the Respondents themselves admit. After all, the case was tried under a different set of ground rules.

Moreover, the Eleventh Circuit's decision that, in its opinion, the only resolution of this issue would be exoneration of the City

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10. The Board argued as a ground for reversal, which was adopted by the City, as follows:

> [T]he trial court refused to allow any testimony by a member of the Board regarding the motivation behind the Board's decision to discharge the plaintiff. (R4-111-734, 735). He also refused to admit the transcript of the testimony heard by the Board before making its decision. (R4-111-716, 717, 718, 719, 720, 721).
>
> This obviously precluded the Civil Service Board from putting on any defense whatsoever to the discharge claim and constitutes reversible error.

Board Br., p. 20; City Br., p. 23.

The impropriety of the Eleventh Circuit's finding of insufficient evidence is highlighted by the respondents' arguments on appeal that the district court erred by "refus[ing] to allow any testimony by a member of the Board regarding the motivation behind the Board's decision to discharge the plaintiff. (R4-111-734, 735). Respondents also argue that the court refused to admit the transcript of testimony heard by the Board before making its decision. (R4-111-716, 717, 718, 719, 720, 721)". Board Br. at 20; City Br. at 23 (incorporating Board's argument). Thus, the Eleventh Circuit's comment in footnote 2 of the opinion that Stimpson did not mention "any discriminatory motive behind the charges at her hearing" is speculation since the full Board hearing transcript was not before the court to review. (*Compare* Ap. A-9a n.2 *with* R4-111-716-721). *Cf. Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 134 (1st Cir. 1997) (First Circuit determined the record was incomplete in order to resolve a "public concern" issue; however, "[r]ather than groping for an answer to the question under the combined weight of these handicapping circumstances, we think that it would be fairest, all around, to remand and give the parties (not to mention the district court) a full opportunity to explore all aspects of this issue").

because the Board was independent and not infected with the City's discriminatory animus completely ignores that one jury had already determined that the City intentionally discriminated against Stimpson by terminating her because of her sex.[11] R9-845. This determination flies in the face of the court's conclusion that sufficient evidence did not exist to find causation as such a verdict certainly could be read to imply that the City's discrimination was the "motivating factor" or cause of Stimpson's termination, regardless of who made the ultimate decision. However, since only a general verdict was entered, the Eleventh Circuit could not have known what the decision was based upon and this Court's holding in *Pullman-Standard* and the Seventh Amendment mandated that, under these circumstances, the cause must be remanded for a new trial before a jury to make factual findings in light of the legal standard for evaluating the case.[12]

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11. *Arenson v. Southern Univ. Law Ctr.*, 911 F.2d 1124, 1127-28 (5th Cir. 1990) (in an action under 42 U.S.C. § 1981 and Title VII, jury found in favor of plaintiff on § 1981, court granted jnov and dismissed equitable Title VII claims; appellate court reversed and reinstated jury verdict where some evidence existed that the defendants discriminated and concluded that "[i]n close cases such as the one we decide today, we must allow the jury's determination of the facts to stand"), *cert. denied*, 499 U.S. 949 (1991); *Van Houdnos v. Evans*, 807 F.2d 648, 654 (7th Cir. 1986) (Seventh Circuit reversed district court's entry of jnov where plaintiff presented evidence of discrimination; jury was the proper body to weigh the evidence and assess credibility of the witnesses — not the court).

12. *Icicle Seafoods, Inc. v. Worthinton*, 475 U.S. 709, 714-715 (1986) (Supreme Court held that after the court of appeals determined that the district applied the wrong legal standard for what constitutes a "seaman," it "was mistaken to engage in such factfinding" by independently reviewing the record in light of the legal standard it adopted; the Court further stated that "[i]f the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings"); *Lehman v. Trout*, 465 U.S. 1056, 1056 (1984) (Supreme Court ordered that the appellate court remand to the district court for findings of fact and additional evidence based upon the appe.'ate court's determination of what constituted actionable employment decisions in the class action).

The Eleventh Circuit has violated one of Stimpson's fundamental rights — to have her action at law determined by a jury as promised by the Seventh Amendment and Title VII.[13] The jury entered a general verdict in favor of Stimpson, finding that the City discriminated against Stimpson by recommending her discharge because of her sex in violation of Title VII. By reversing the jury's verdict and rendering judgment in favor of the respondents, the Eleventh Circuit has completely usurped the jury's role in violation of Stimpson's right to a jury trial guaranteed by the Seventh Amendment.

A disturbing practice of taking away verdicts awarded by juries in favor of civil rights' litigants has developed in the Eleventh Circuit. In *Combs v. Plantation Patterns*,[14] the jury determined that the defendant discriminated against the plaintiff by denying him a promotion to a supervisory position because of his race. On appeal, the court weighed the evidence presented to the jury and, contrary to the jury's verdict, determined "Combs failed to produce evidence sufficient to permit a reasonable factfinder to disbelieve Meadowcraft's proffered nondiscriminatory explanation that it promoted Walker instead of Combs because

13. In 1991, Congress amended Title VII to provide the right to a jury trial to litigants seeking compensatory and punitive damages for intentional discrimination. 42 U.S.C. § 1981a(c)(1) ("If a complaining party seeks compensatory or punitive damages under this section — (1) any party may demand a trial by jury . . ."). The legislative history of the Civil Rights Act of 1991 reveals Congress' recognition of the important constitutional right that was being conferred and Congress' complete confidence in the ability of juries to competently decide issues under Title VII. Congress concluded that

> [t]he jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment's guarantee. Just as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct.

H.R. Rep. No. 102-40(I), 72 (1991) (footnote omitted), *reprinted in* 1991 U.S.C.C.A.N. 549, 610.

14. 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998).

Walker had superior supervisory experience."[15] *Id.* at 1543. The verdict was reversed and the case was remanded for entry of judgment in favor of the defendant. *Id.* In *Sullivan v. National R.R. Passenger Corp.*[16] the jury's finding that the defendant retaliated against the plaintiff for complaining of discrimination was cast aside. The Eleventh Circuit remanded the case for entry of judgment in favor of the employer, again under the auspices of the appellate court's finding of "insufficient evidence" supporting the jury's determination that the plaintiff's protected complaints were causally connected to his subsequent termination and inability to be rehired. *Id.* at 1060-61. In *Clover v. Total System Serv., Inc.*,[17] the Eleventh Circuit reversed another jury's verdict finding that the employer retaliated against the plaintiff for participating in a sexual harassment investigation by assuming the role of factfinder and determining that no reasonable juror could find that the plaintiff's protected conduct was casually connected to the decision to discharge her. *Id.* at 1355-56. These three examples amount to appellate holdings that no reasonable jury could arrive at the decision reached by the actual juries.

The decision in *Stimpson* extends the Eleventh Circuit's proclivity for invading the province of juries in civil rights' cases to another level.[18] In the examples of *Combs, Sullivan* and *Clover* cited above, the Eleventh Circuit found that the evidence was insufficient to support the jury's findings on issues that had actually been presented to the jury. In *Stimpson*, however, the Eleventh Circuit assumed the role as the trier of fact on a factual issue that had *never* been presented to the jury in the district court. According to the Eleventh Circuit, in order to hold the City liable for its

15. This, despite the fact that the Eleventh Circuit upheld the jury's determination that two of the defendant's three explanations were not the real reasons. *Id.* at 1539-41.

16. 170 F.3d 1056 (11th Cir.), *cert. denied,* 120 S. Ct. 402 (1999).

17. 176 F.3d 1346 (11th Cir. 1999).

18. *Cf. Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1278 (11th Cir. 1999) (Barkett, J. concurring in part, dissenting in part) ("[t]he mistrust of juries evidenced by the majority is at odds with the specific directive of Congress that the jury is to decide whether gender discrimination has occurred . . .").

recommendation to discharge Stimpson, Stimpson was required to show that a causal link between the discriminatory recommendation and the Board's decision to uphold the discharge. App. A-7a. The *Stimpson* court then took it upon itself to review the record and determine if any evidence supported this factual issue. App. A-8a-9a. However, the issue of the City's involvement in the Board's ultimate decision to discharge Stimpson was not tried before the jury, and the district court did not permit any evidence regarding the Board's decision to terminate Stimpson, the discharge proceedings before the Board, or the City's active participation in the discharge proceedings before the Board. The Eleventh Circuit must not be allowed to circumvent the Seventh Amendment, Title VII, and binding precedent from this Court by declaring itself the trier of fact in the first instance for factual issues that were not presented to the jury at trial.

In *Stimpson*, the Eleventh Circuit did not just blur, but rather it erased the critical distinction between the role of the court and the role of the jury as protected by the Seventh Amendment.[19] In *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court held that the appellate court properly determined that the district court erred in denying the plaintiff a new trial where it found the damages awarded by the jury inadequate notwithstanding that the defendant consented to the increased award set by the trial court. The Court held that the only action was for the trial court to grant a new trial.

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19. The Court stated in *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913):

> In the trial by jury, the right to which is secured by the 7th Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or, to permit one to disregard the province of the other is to impinge on that right.

Id. at 382.

> The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. . . . When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."

Id. at 486-87.

In *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), this Court reviewed the Ninth Circuit's decision to reverse the district court's judgment in favor of the petitioner and render judgment for the respondent on the grounds that district court decided the case under the wrong legal standard. While this Court agreed with the Ninth Circuit that the district court did employ the wrong legal standard, it vacated the judgment and instructed that the case be remanded to the district court for further findings. *Id.* at 332.

> We part company with the Court of Appeals on the propriety of a remand. The court rendered judgment for respondent apparently because it determined that the District Court had found that there was no employment relationship, or because it had decided on its own that any such finding would have been

> clearly erroneous . . . Similarly, while the Court of Appeals may have meant to suggest that in its view the record could not support a finding of employment, that suggestion is not developed in its opinion, and we think the best course at this point is to require the trier of fact to re-examine the record in light of the proper legal standard.

Id.; *see also Hetzel v. Prince William County,* 118 S. Ct. 1210, 1211-12 (1998) (holding that the Court of Appeals' mandate to the district court "to enter judgment for a lesser amount than that determined by the jury without allowing the petitioner the option of a new trial, cannot be squared with the Seventh Amendment" and accordingly, reversing the appellate court's judgment).

This Court again acknowledged its utmost respect for Seventh Amendment in *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415 (1996) where the Court vacated the Second Circuit's judgment with instructions to "remand the case to the district Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against" the proper legal standard established by the Court for evaluating damage awards under state law. *Id.* at 438. In its discussion, the Court noted:

> The Seventh Amendment, which governs proceedings in federal court, but not in state court, bears not only on the allocation of trial functions between judge and jury, . . . it also controls the allocation of authority to review verdicts, the issue of concern here.
>
> . . .
>
> Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals primary responsibility for application of § 5501(c)'s "deviates materially" check. Trial judges have the

> "unique opportunity to consider the evidence in the living court room context", while appellate judges see only the "cold paper record."

Id. at 432, 437.

The Eleventh Circuit's opinion in the current case ignores the Seventh Amendment and the holdings of *Pullman-Standard*, *Kelley, Gasperini* and others.[20] When Title VII was amended to add the right to legal relief in the form of compensatory and punitive damages, courts became bound by the same Seventh Amendment concerns in cases arising under Title VII as have been applied in other actions at law. The Eleventh Circuit deprived Stimpson of her constitutional right to have the opportunity to present the question of the Respondents' liability to a jury. In effect, the panel of three deemed themselves judge and jury. The only option available to the Eleventh Circuit in light of its determination that the case was not evaluated under the proper legal standard for holding the City liable was to remand for a new trial.

This Court should grant certiorari to reverse the Eleventh Circuit and preserve Stimpson's constitutional rights.

> [T]his court in a very special sense is charged with the duty of construing and upholding the Constitution; and, in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.
>
> . . .
>
> The right of trial by jury is of ancient origin characterized by Blackstone as "the glory of the English law' and 'the most transcendent privilege

---

20. *Slocum*, 228 U.S. at 387 (observing that the right to a jury trial is a " 'constitutional right this court has always guarded with jealousy' ") (citations omitted).

> which any subject can enjoy" (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, s 1779), "* * * the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. **Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of that right to a jury trial should be scrutinized with the utmost care.**

Dimick, 293 U.S. at 485-86 (emphasis added).[21]

CONCLUSION

Based on the foregoing, Petitioner asks that her Petition for Writ of Certiorari be granted. In the alternative, Petitioner asks that her Petition for Writ of Certiorari be held and granted and that the case be remanded in light of the Court's opinions in *Reeves* and *Marley.*

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21. *Accord Gasoline Prods. Co. v. Champlin Ref. Co.,* 283 U.S. 494, 498 (1931) ("It is the Constitution that we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law.").

Respectfully submitted,

SAMUEL FISHER
Counsel of Record
JOEL S. ISENBERG
KIMBERLY C. PAGE
Attorneys for Petitioner
1400 Southtrust Tower
Birmingham, AL 35203-3204
(205) 328-0640

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 98-6142 and 98-6186

D. C. Docket No. 95-CV-570-W

SANDRA LEIGH STIMPSON,

Plaintiff-Appellee,

versus

CITY OF TUSCALOOSA, J. RUSSELL GIBSON, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Alabama

(August 30, 1999)

Before COX, Circuit Judge, FAY, Senior Circuit Judge, and NANGLE*, Senior District Judge.

---

* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

Appendix A

PER CURIAM:

The City of Tuscaloosa ("the City") and the Civil Service Board of Tuscaloosa ("the Civil Service Board") appeal a judgment against them under Title VII for wrongful termination based on sex. They argue that the district court wrongly denied their motion for a judgment as a matter of law because the plaintiff did not introduce any evidence that the City's alleged discrimination directly caused her termination. We agree, and therefore REVERSE.[1]

I. BACKGROUND

Sandra Stimpson was employed as a police officer by the city of Tuscaloosa since 1975. Over the course of her employment, she had a troubled disciplinary record. She received various forms of punishments ranging from reprimands to suspensions, for such transgressions as: giving beer to a prisoner; several instances of deception, including lying about making secret tape recordings of conversations with a superior officer; rudeness to the public; insubordination; several unexcused absences, including at least one while moonlighting; and one instance of threatening to shoot her

---

1. Appellants raise sixteen other grounds for reversal. Because the issue we address is dispositive of the case, we need not sort out the wheat from the chaff in the other claims of error. Appellee also filed a cross-appeal in this case, attacking the trial court's decision to grant summary judgment for the Civil Service Board. In her brief, Stimpson makes this cross appeal contingent on this Court reversing the trial court's joinder of the Board as a Rule 19 party. Because we do not reverse that ruling, we need not address Stimpson's cross-appeal.

partner. Despite the repetitive and serious nature of some of these violations, Stimpson was given many chances to improve her behavior.

In September of 1992, Stimpson came to work with her hand and wrist immobilized in a splint. She presented a note from her doctor, Dr. Ikard, stating that she was fit to return to work. After seeing the splint, Stimpson's superiors became concerned that her immobilized hand might hinder her ability to perform some of her official duties safely. Chief Swindle decided that the City needed to verify that Dr. Ikard knew what Stimpson's job duties were and took those duties into account when he deemed her fit to return to work. When Assistant Chief Wilkins contacted Dr. Ikard to clarify these issues, Ikard refused to discuss the matter unless Stimpson signed a medical release. Wilkins next sent Stimpson's sergeant to get her to execute a release, but Stimpson refused to sign. The next day, Wilkins himself requested that she sign the release, but Stimpson again refused. The following day, Wilkins again approached Stimpson. This time he had developed a new "return to work" form that described a patrol officer's job duties and explained that there was no alternative "light-duty" assignment available. He asked Stimpson to return to Dr. Ikard and have him sign the new form. Stimpson refused. He then ordered Stimpson to go to the Emergi-Care clinic to have a different doctor examine her hand and wrist and determine whether she could safely perform her job functions. Faced with suspension if she did not comply, Stimpson went to the clinic.

Stimpson was very agitated when she got to the clinic. According to several witnesses, she raised her voice and used

profanities. Some of the witnesses filed complaints and expressed shock that a police officer would behave that way in public, especially in uniform. Once in the doctor's office, she refused to cooperate with the nurse's initial examination and threatened to sue the doctor, Doctor Lovelady, if he contradicted Dr. Ikard's recommendation. After being threatened, Lovelady refused to perform the examination. Later, he called the police department and complained about the incident to Chief Swindle. Stimpson returned to work, telling her supervisor that Lovelady did not examine her and she therefore did not get the return to work form signed. She was then suspended until such a time as she could produce the form signed by a doctor. Only after being suspended did she contact Dr. Ikard and get him to sign the form. After getting the signature, she returned to work with the form and was reinstated.

In October, following an investigation of the Emergi-Care incident by the Tuscaloosa Police Department, Stimpson was suspended with pay. Based on her behavior at Emergi-Care coupled with her history of disciplinary problems, Chief Swindle recommended that she be terminated. Under Alabama state law, the City of Tuscaloosa has no power to unilaterally fire a police officer. Instead, Alabama has created a Civil Service Board of Tuscaloosa, whose members are appointed by the Governor of Alabama. The Board, alone, has the power to terminate a police officer. Chief Swindle informed Stimpson that he intended to recommend her discharge to the Board. He offered her the chance to resign instead, as he testified he had done with all of the other officers he had intended to refer to the Board for discharge. She refused to resign, and so Swindle instituted

proceedings before the Civil Service Board. The Board, which at the time consisted of two men and one woman, held a three-day hearing in January of 1993. Stimpson was represented by counsel at this hearing and put on witnesses in her defense. On January 8, 1993, the Civil Service Board unanimously decided to terminate Stimpson based on her conduct surrounding the Emergi-Care incident, after also considering some of the most recent and egregious misconduct in her disciplinary record.

In April of 1993, Stimpson filed a charge with the EEOC, alleging discriminatory discharge based on sex and age against the City of Tuscaloosa. After receiving a right to sue letter from the EEOC, Stimpson filed suit in the Northern District of Alabama under Title VII and the ADEA. She eventually added counts under 42 U.S.C. § 1983 against Swindle and Wilkins and added the members of the Civil Service Board as defendants in their official capacity. Before trial, the § 1983 claims were dropped and the Civil Service Board's motion for summary judgment was granted. The Board was subsequently reintroduced as a Rule 19 defendant because it would be needed procedurally if reinstatement was granted to Stimpson, but the Board was no longer a defendant for liability purposes.

Prior to the introduction of evidence at trial, Stimpson voluntarily dismissed her age discrimination claim. Before and at trial, Stimpson's case was based on trying to show that the City's decision to recommend her termination was the discriminatory adverse employment action. At no time did Stimpson ever introduce any evidence or even make a concrete allegation that the Board's decision to terminate

her was based on her sex. The City moved for judgment as a matter of law on several grounds, including that it had not actually terminated Stimpson, and that she had not proven that the decision to terminate her, made by the Board, was based on sex. Following the district court's denial of the motion, the jury returned a verdict in favor of Stimpson. The court's final judgment ordered her reinstatement and awarded her $300,000 damages plus back pay and attorneys fees. Appellants filed timely notice of appeal and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

We review denial of a motion for judgment as a matter of law *de novo*, using the same legal standard as the district court. *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198, 1200 (11th Cir. 1993). Under this standard, we must view the evidence in the light most favorable to the non-moving party. *Id.*

III. DISCUSSION

Appellants argue that Stimpson failed to produce any evidence that the Civil Service Board's decision to terminate her was based on sex. Stimpson contends that the motivation of the Board is irrelevant, and that the City's recommendation that she be terminated is actionable in and of itself. We disagree. Title VII prohibits the discharge of an employee, or other discrimination with respect to terms and conditions of a person's employment, based on the employee's sex. 42 U.S.C. § 2000(e)-2(a)(1). In order to prove intentional discrimination under this section, a plaintiff must establish

(1) the employer's discriminatory animus towards the employee based on the employee's protected characteristic; (2) a discharge or other significant change in the terms or conditions of employment; and (3) a causal link between the two. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998). In this case, there is no question that Stimpson was discharged. Although we have grave reservations about the disparate treatment evidence presented by Stimpson, we need not address that issue because even assuming, *arguendo*, that she introduced sufficient evidence to allow a reasonable jury to find discriminatory animus on the part of the City, the causal link between that animus and her termination is broken by the Board's hearing and independent decision to actually terminate her.

We note at the outset that under Alabama law, the City has no power to terminate police officers such as Stimpson. Under Act No. 249 of the Alabama legislature, 1947 Ala. Acts 174, only the Civil Service Board has the power to do so. The Board has the discretion to terminate, give a lesser form of punishment to, or entirely vindicate a police officer brought before it. Consequently, the City's recommendation that the Board terminate Stimpson does not, itself, constitute a change in the terms or conditions of employment absent a sufficient causal link between the termination and the discriminatory animus behind the recommendation.

We have previously stated the general proposition that in some cases, a discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge. *Zaklama v.*

Mt. Sinai Medical Center, 842 F.2d 291, 294 (11th Cir. 1988). However, as we have recently explained, this causation must be truly direct. When the biased recommender and the actual decisionmaker are not the same person or persons, a plaintiff may not benefit from the inference of causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee. *Llampallas*, 163 F.3d at 1248.

One way of proving that the discriminatory animus behind the recommendation caused the discharge is under the "cat's paw" theory. This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee. In such a case, the recommender is using the decisionmaker as a mere conduit, or "cat's paw" to give effect to the recommender's discriminatory animus. *Id.* at 1249.

In this case, Stimpson has not introduced any evidence that could reasonably indicate that the City's alleged discriminatory animus influenced the Board's decision to terminate her. Furthermore, she has not introduced any evidence to show that the Board acted as a "cat's paw" or rubber stamp for the City's recommendation. To the contrary, the evidence shows that the Board has the sole power and discretion to terminate police officers, that its members are appointed by the Governor of Alabama, that it conducted a three day hearing to investigate the charges, and that during

the hearing Stimpson was represented by legal counsel and was allowed to put on defense evidence and witnesses.[2] It is hard to imagine any other procedural device that would ensure a more fair and independent decision than that of the Civil Service Board. We need not announce a bright line at which an independent investigation becomes a rubber stamp to resolve this case, because the record before us does not contain any hint of a cat's paw arrangement. Consequently, we hold that Stimpson has failed to produce sufficient evidence to allow a reasonable jury to find causation between the City's alleged discriminatory animus and the Board's decision to terminate her. We VACATE the district court's Order of Final Judgment and Permanent Injunction and REMAND with instructions to enter judgment for appellants, consistent with this opinion.

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2. We curiously note that Stimpson apparently never mentioned any discriminatory motive behind the charges at her hearing before the Civil Service Board. It seems like that would have been an ideal time and place to do so.

APPENDIX B — FINAL JUDGMENT AND PERMANENT INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION DATED AND FILED JANUARY 28, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

CIVIL ACTION NUMBER
95-C-0570-W

SANDRA LEIGH STIMPSON,

Plaintiff,

vs.

CITY OF TUSCALOOSA, ALABAMA, and
TUSCALOOSA CIVIL SERVICE BOARD,

Defendants.

FINAL JUDGMENT AND PERMANENT INJUNCTION

Based on the Special Verdict of the Jury, and pursuant to 42 U.S.C. § 2000e *et seq.*, ("Title VII"), it is hereby ORDERED, ADJUDGED, DECREED, and DECLARED as follows:

1. The defendant CITY OF TUSCALOOSA, ALABAMA, discriminated against the plaintiff SANDRA LEIGH

STIMPSON by recommending her discharge because of her sex, in violation of Title VII.

2. The defendant CITY OF TUSCALOOSA, ALABAMA, its agents, officers, employees (including, without limitation, Chief of Police KEN SWINDLE and Assistant Chief of Police BILLY WILKINS), and those in active concert or participation with them who receive actual notice of this Order, are PERMANENTLY ENJOINED from discriminating against plaintiff SANDRA LEIGH STIMPSON because of her sex.

3. The defendants TUSCALOOSA CIVIL SERVICE BOARD and CITY OF TUSCALOOSA, ALABAMA shall reinstate the plaintiff SANDRA LEIGH STIMPSON to her position in the Tuscaloosa Police Department, with all accrued benefits and rights.

4. The plaintiff SANDRA LEIGH STIMPSON shall have and recover of the defendant CITY OF TUSCALOOSA the sum of Three Hundred Thousand Dollars ($300,000.00) as compensatory damages.

5. The defendant CITY OF TUSCALOOSA shall, within ten (10) days of the date of this Order, file with the Court and serve on plaintiff's counsel a computation of the amount of wages and accrued benefits which the plaintiff lost as a result of her discharge. Within seven (7) days thereafter, plaintiff's counsel shall serve on defendants' counsel a computation of the back pay due to the plaintiff (excluding interim earnings) plus prejudgment interest. Following receipt of plaintiff's computation, defendant CITY

OF TUSCALOOSA shall either pay over to the plaintiff the appropriate back pay amount (less the usual deductions) or petition the court for an evidentiary hearing on the back pay issue within ten (10) days.

6. The plaintiff shall have and recover of the defendant CITY OF TUSCALOOSA a reasonable attorney's fee and reimbursement of the expenses reasonably incurred in the prosecution of this action. Within fifteen (15) days of the date of this Order, plaintiff's counsel shall file with the Court and serve on the defendant a statement of the total fee requested, services performed, hours expended, and expenses incurred in this action. If the parties are thereafter unable to agree on a reasonable fee, either party may petition the Court for an evidentiary hearing on the issue.

The costs of this action are taxed against the defendant CITY OF TUSCALOOSA.

DONE this 28th day of January, 1998.

s/ U.W. Clemon
UNITED STATES DISTRICT JUDGE
U. W. CLEMON

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR DAMAGES AND GRANTING MOTION FOR ATTORNEY FEES DATED AND FILED AUGUST 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 98-6142 and 98-6186

SANDRA LEIGH STIMPSON,

Plaintiff-Appellee,

versus

CITY OF TUSCALOOSA, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

Before COX, Circuit Judge, FAY, Senior Circuit Judge, and NANGLE*, Senior District Judge.

BY THE COURT:

The motion for damages, interest and double costs is DENIED. The clerk shall tax costs in accordance with the rules.

The motion for attorney fees is GRANTED, and the matter is REMANDED to the district court for a determination of an amount.

---

* The Honorable John F. Nangle, Senior District Judge for the Eastern District of Missouri, sitting by designation.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 27, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 98-6142 and 98-6186

SANDRA LEIGH STIMPSON,

Plaintiff-Appellee,

versus

CITY OF TUSCALOOSA, J. RUSSELL GIBSON, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: COX, Circuit Judge, FAY, Senior Circuit Judge, and NANGLE*, Senior District Judge.

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* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
SENIOR UNITED STATES CIRCUIT JUDGE

(2)

No. 99-1247

Supreme Court, U.S.
FILED
FEB 26 2000
CLERK

IN THE

Supreme Court of the United States

SANDRA LEIGH STIMPSON,

Petitioner,

v.

CITY OF TUSCALOOSA, J. RUSSELL GIBSON, in his official capacity as member of the Tuscaloosa Civil Service Board; BILL DELOACH, in his official capacity as member of the Tuscaloosa Civil Service Board; RON TURNER, in his official capacity as member of the Tuscaloosa Civil Service Board,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

C. C. TORBERT, JR.
DAVID M. SMITH
CAROLE A. GOLINSKI
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
Suite 2400
Birmingham, Alabama 35203
(205) 254-1000

ROBERT W. ENNIS, IV, *City Attorney*
Counsel of Record
City of Tuscaloosa,
Legal Department
P.O. Box 2089
Tuscaloosa, Alabama 35403
(205) 349-0101

Attorneys for Respondents

158109

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

29pp

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Statement of the Case 1

A. Statement of the Facts 1

B. Statement of the Proceedings 6

Summary of the Argument 9

Reasons for Denying the Writ 10

I. Standard of Review 10

II. *St. Mary's Honor Ctr. v. Hicks* 16

III. New Trial 17

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14

Austin v. Paramount Parks, Inc., 195 F.3d 715 (4th Cir. 1999) 15

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 21

Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989) 18

Combs v. Plantation Paterns, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998) 14

Dominium Management Services, Inc., v. Nationwide Housing Group, 195 F.3d 358 (8th Cir. 1999) .. 15

Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999) 15

Hoover v. Ronwin, 466 U.S. 558 (1984) 10

Huffman v. County of Los Angeles, 147 F.3d 1054 (9th Cir. 1998) 15

Cited Authorities

Page

Jimenez v. Bancomercio De Puerto Rico, 174 F.3d 36 (1st Cir. 1999) 15

Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994) 19

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 16

Llampallas v. Mini-Circuits Lab., Inc., 163 F.3d 1236 (11th Cir.), *cert. denied*, 120 S. Ct. 327 (1999) 15

Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996) 19

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 13

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967) 21

New York Elev. R. Co. v. Fifth Nat. Bank, 135 U.S. 432 (1890) 12

Pullman-Standard v. Swint, 456 U.S. 273 (1982) .. 22

Raney v. Vinson Guard Service, Inc., 120 F.3d 1192 (11th Cir. 1997) 19

Cited Authorities

Page

Reeves v. Sanderson Plumbing Products, Inc., 197 F.3d 688 (5th Cir. 1999) 10, 13, 17

Rego v. ARC Water Treatment Co. of Pa., 181 F.3d 396 (3d Cir. 1999) 15

Scamardo v. Scott County, 189 F.3d 707 (8th Cir. 1999) 15

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 16, 17

Sullivan v. National R.R. Passenger Corp., 170 F.3d 1056 (11th Cir.), *cert. denied*, 120 S. Ct. 402 (1999) 15

Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999) 10, 15

Taylor v. Virginia Union Univ., 193 F.3d 219 (4th Cir. 1999) 15

United States v. Ortiz, 422 U.S. 891 (1975) 12

Virgo v. Riviera Beach Assoc., Ltd., 30 F.3d 1350 (11th Cir. 1994) 18

Walls v. Button Gwinnett Bancorp, Inc., 1 F.3d 1198 (11th Cir. 1993) 12

Cited Authorities

Page

Weisgram v. Marley Co., No. 99-161 (U.S. Feb. 22, 2000) 17, 21

Wills v. Brown University, 184 F.3d 20 (1st Cir. 1999) 15

Statutes:

12 U.S.C. § 1983 6

28 U.S.C. § 216 6

42 U.S.C. § 2000(e) 18

42 U.S.C. § 2000(e)-2(a)(1) 18

Rules:

Federal Rule of Appellate Procedure 28(b)(4) 10

Federal Rule of Civil Procedure 50 ..... 7, 9, 10

Federal Rule of Civil Procedure 50(a) 14, 19

United States Supreme Court Rule 10 ..... 9, 20

United States Supreme Court Rule 10(a) 17

STATEMENT OF THE CASE

A. Statement of the Facts

On May 17, 1975, the Petitioner was employed as a police officer with the City of Tuscaloosa. (R4-111-84). During her employment she had a poor disciplinary record, including giving beer to a prisoner (R4-111-98 through 101, 175 through 181, 372), making a false claim for sick leave (R4-111-188, 189), threatening to shoot a fellow police officer (R4-111-410, 474, 475, 552, 553, 561, 562, 611, 612, 614, 622, 628, 653), deceiving superior officers (R4-111-190, 191, 192, 565, 566, 613), and several other acts of insubordination (R4-111-563) and rudeness to the public (R4-111-171, 372). Over the years she was given numerous "second chances" and every form of punishment short of discharge. (R4-111-633, 645).

The Petitioner also had a very poor attitude. As the Chief of Police, Ken Swindle, testified, "anytime that you work with Ms. Stimpson, it was a confrontation between her and her supervisor. Anytime she was questioned about something, it would be a confrontation." (R4-111-272, 273). He added, "We were all walking around on eggshells." (R4-111-275).

The "straw that broke the camel's back" was an incident that occurred in September of 1992. The Petitioner who was assigned to the Patrol Division (R4-365), came to work with a hard plaster cast "thumb spica" splint on her left hand and wrist which immobilized her wrist and thumb. (R4-111-101, 102, 103, 104, 105, 106, 126, 194, 195, 271, 444, 455, 456, 563). It is undisputed that, although she had a note from her doctor, Dr. Stephen Ikard, allowing her to return to work

following his application of this splint, the note did not state whether she could safely perform all of her duties as a police officer. (R4-111-195, 196, 198, 365).

It is further undisputed that her superiors were concerned that the splint would hinder her ability to perform certain essential functions of her "front line" job such as firing a gun, handcuffing a suspect and restraining drunk or drug-impaired resistive suspects. (R4-111-196, 197, 198, 271, 272, 274, 364, 365, 366, 367, 439, 440). They were also concerned about liability issues should the Petitioner or a third-party suffer injury due to her impairment. (R4-111-276).

The Department's concern had nothing to do with the Petitioner's sex. (R4-111-366, 367, 368, 574). Chief Swindle simply deemed it necessary that "a doctor . . . say he knew what her job functions were and that she could perform them." (R4-111-369, 370, 574).

Assistant Police Chief William Wilkins attempted to resolve these concerns by trying to discuss them with Dr. Ikard. Dr. Ikard's office informed Wilkins, however, that no such discussion could take place unless the Petitioner signed a medical release. (R4-111-277, 278, 362, 263, 512, 513, 566, 567). In accordance with this requirement and consistent with the procedures utilized by the police department when the ability of *male* police officers to do their job was in question, the Petitioner was requested to execute a release (R4-111-567, 568, 569, 570, 607, 608, 609, 610). However, she refused two requests to sign a medical release (R4-111-112, 113, 114, 115, 116, 117, 201, 202, 234, 279, 284, 567, 569) despite her admission that it was reasonable to request such a release of information regarding her wrist. (R4-111-201, 539). Exemplifying her contempt for authority, she

threw one of the releases on a patrol car (R4-111-279) and told Assistant Chief Wilkins it was none of his business. (R4-111-585).

Therefore, Wilkins prepared a form to be signed by a doctor which pointed out that the City had no "light duty" jobs, listed the essential functions of the Petitioner's job and stated that the Petitioner could safely perform those functions. The Petitioner was given the option of simply taking this form to Dr. Ikard for signature on "city time," but she refused. (R4-111-119, 120, 121, 132, 203, 207, 208, 285, 286, 570, 571, 572, 573, 589, 594). She was then ordered (R4-111-535, 536, 537, 538, 563, 564, 574, 577, 587, 594, 595, 663) by Wilkins to go to Emergi-Care Clinic, a medical clinic which performed occupational injury examinations and treatment for the City and other employers, for examination of her hand and wrist and a medical determination that she could safely perform her job functions as a police officer. (R4-111-121, 212, 247, 248, 288, 291, 439, 440, 536, 564, 571, 573, 657). If such a determination was made, she was to have the doctor execute the form and bring it back in. (R4-111-564, 573, 666). If she failed to do so, suspension with pay would result. (R4-111-573, 663).

The Petitioner was extremely angered by this order. Upon her arrival at Emergi-Care, she caused a disturbance while she was both in uniform and on city time, by cursing in the lobby in the presence of employees and patients alike, and by being generally uncooperative. (R4-111-121, 122, 123, 124, 125, 209, 210, 211, 538, 539, 677, 678, 692, 695, 696, 703, 704, 705, 706, 708, 709, 711). She even threatened the doctor who attempted to examine her, Dr. Stephen Lovelady, with a lawsuit. (R4-111-127, 128, 212, 213, 214, 288, 712). As a result, no examination was made. (R4-111-127, 581, 663).

Lovelady then called the Police Department and complained to Police Chief Swindle. (R4-111-142, 234, 235, 289, 290, 268, 448). It is undisputed that Lovelady was upset and angry and told Swindle that while at Emergi-Care, the Petitioner had "created a scene down front," had been hostile, abusive and angry, and "had threatened him with a lawsuit." (R4-111-290, 368, 369, 441, 442, 445, 449, 450, 451, 453, 456, 457, 458, 577).

When later confronted with what had occurred, the Petitioner denied everything. (R4-111-129, 215, 216, 220, 221, 222, 371). Chief Swindle noted that denial and deception was a "pattern in her record" (R4-111-371) and Assistant Chief Wilkins deemed the episode "quite serious" insubordination. (R4-111-561, 564).

In October of 1992, following an investigation of this incident and a review by Chief Swindle of the Petitioner's entire prior disciplinary record (R4-111-297, 370, 395, 400, 401, 426, 450, 451, 453, 555, 556, 559, 560, 630, 632, 692; Defendant's Exhibit 24), Chief Swindle decided to (R4-111-244, 373, 374) institute proceedings against her before the Civil Service Board requesting her discharge after giving her the opportunity to resign. (R4-111-662). This action was taken without any consideration of the Petitioner's sex (R4-111-375, 376). Contrary to the Petitioner's representations in her petition herein, she presented absolutely no evidence of similarly situated male police officers who were treated differently than she was. In particular, no police officer had ever amassed a disciplinary record as extensive and serious as hers. Moreover, she never established that the City's reasons for discharging her were pretextual.

The Petitioner testified during the trial as to her belief regarding the true motivation for the charges:

> Dr. Lovelady was obviously mad, angry when I left the clinic. So I figured it had something to do with Dr. Lovelady being mad at me.

(R4-111-142). In response to questions from her own lawyers, she admitted that the charges against her arose out of the incident at Emergi-Care. (R4-111-234, 235). In an offer of proof to the court, Petitioner's counsel stated that:

> After Chief Swindle got that call, then he set about investigating not because his officer had done anything effectively wrong, but *because Dr. Lovelady and the people at Emergi-Care wanted her punished.*

(R4-111-254). Petitioner's counsel further argued that Lovelady had "no right to call the Chief and report what happened." (R4-111-429).

Significantly, neither the City nor Swindle had the authority to discharge her, and they did *not* discharge her. (R4-111-393, 715). The actual decision to discharge the Petitioner, which was unanimous, was made by the Civil Service Board after a lengthy administrative hearing where the Petitioner was represented by competent legal counsel. (R4-111-394, 395, 415, 578, 716, 719). At the time of the Board's decision, which was on January 8, 1993, (R4-111-157, 228) the Board consisted of two men and one woman. The reason cited by the Board for its decision was the Emergi-Care incident along with the Petitioner's prior disciplinary record. (R4-111-716, 722, 733, 736, Defendants' Exhibit 25).

On April 29, 1993, the Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) charging the City of Tuscaloosa with discrimination based on sex and age, and alleging that the earliest and last date discrimination took place was January 8, 1993, the date of the Board's decision, not the date of the City's decision. Notably, she made *no* EEOC charge against the Civil Service Board. (R1-2-Exhibit to Complaint). For future reference, it should be noted that the sole decision challenged by the Petitioner was the decision to discharge the Petitioner which, as a matter of law, could only be made by the Civil Service Board.

B. Statement of the Proceedings

On March 8, 1995, the Petitioner filed suit in the United States District Court for the Northern District of Alabama against Respondent City of Tuscaloosa alleging that she was discharged because of her sex and age, and also because she had filed a lawsuit for overtime under 28 U.S.C. § 216. (R1-2-1, 4).

On August 9, 1995, the Petitioner amended the Complaint to add as additional defendants Respondent Civil Service Board of Tuscaloosa ("the Board"), through its current members, J. Russell Gibson, Bill DeLoach and Ron Turner in their official capacity, and Police Chief Ken Swindle and Assistant Police Chief William ("Billy") Wilkins as additional defendants. This amendment also added a claim under 12 U.S.C. § 1983. (R1-10-1). The claims against Swindle and Wilkins, as well as all claims not based on Title VII and the ADEA, were dismissed pursuant to a stipulation of the parties filed September 8, 1995, leaving only the Title VII and ADEA discharge claim to be adjudicated. (R1-18-1).

The Respondents moved for summary judgment. The City's motion, which was based on the undisputed fact that the decision to discharge the Petitioner was made by the Civil Service Board of Tuscaloosa and not the City, was denied. (R1-20-1).

However, the motion by the Board, which was based on the Petitioner's failure to make a charge of discrimination against the Board to the EEOC, was granted on January 6, 1996. (R1-21-1). Nevertheless, on January 8, 1996, the Petitioner moved to join the Board, again as a "Rule 19 Defendant." This motion was granted on January 11, 1996, without giving the board the opportunity to respond. (R1-26-1).

On January 20, 1998, the trial commenced. Motions in limine filed by each of the parties were made. (R-4-67-1; R4-72-1; R4-73-1). Prior to the presentation of any evidence, the Petitioner voluntarily dismissed her age discrimination claim. The sole theory of liability pursued by the Petitioner at trial was that the City should be held liable for its decision to recommend her discharge. The Petitioner made no effort to prove that the Board's decision to discharge her was motivated by her sex. At the close of the Petitioner's evidence, the Court granted the Respondents' Rule 50 motions with regard to the sexual harassment and punitive damage claims, but denied them in all other respects. (R4-83-1; R4-85-1; R4-111-601, 602, 605). These motions were renewed at the close of all of the evidence but the City's motion was again denied. However, judgment was granted in favor of the Board on the issue of liability. (R4-111-736, 742, 768, 772, 784). The Petitioner moved for judgment as a matter of law (R4-111-736, 737, 742, 783) but this motion was denied (R4-111-754, 783), except with regard to the defense of mitigation. (R4-111-784).

The jury returned a verdict in favor of the Petitioner and against only the City in the amount of $500,000. (R4-86-1). On January 28, 1998, the District Court entered an order entitled "Final Judgment and Permanent Injunction" wherein it, inter alia, enjoined the City, Police Chief Swindle and Assistant Chief Wilkins from discriminating against the Petitioner (R4-88-1); ordered the City *and* the Board to reinstate her (R4-88-1, 2); adjudged that the Petitioner was entitled to $300,000 (R4-88-2); ordered the parties to compute, and the City to pay, the amount of wages and accrued benefits she lost (R4-88-2); and decreed that the Petitioner would be awarded attorney fees. (R4-88-2).

The Respondents' post-trial motions for judgment as a matter of law and for new trial were denied. (R4-89-1; R4-91-1; R4-92-1; R4-93-1; R4-95-1; R5-96-1; R5-97-1; R5-98-1) .

The Respondents filed their notice of appeal on February 18, 1998 (R5-107-1), and amended this notice on March 6, 1998 (R5-113-1) and April 10, 1998. (R5-117-1). The Respondents raised sixteen grounds for reversal. The Petitioner filed a notice of cross-appeal on March 2, 1998, challenging only the initial grant of summary judgment in favor of the Board. (R5-110-1).

On August 30, 1999, the Eleventh Circuit vacated the jury verdict and remanded the case to the District Court with instructions to enter judgment in favor of both Respondents. The Petitioner filed a Petition for Rehearing but that Petition was denied.

SUMMARY OF THE ARGUMENT

Petitions for Certiorari are granted "only for compelling reasons". Supreme Court Rule 10. The Petitioner has not submitted a single compelling reason to grant her petition.

The Petitioner first argues that the Eleventh Circuit's use of an improper standard of review in connection with its review of the District Court's decision on the Respondent's Rule 50 motion compels review by this Court. However, the Petitioner never raised this issue in the Court of Appeals, probably because the standard used by that Court — a standard used by all of the Courts of Appeal — was the standard she had proffered in her Principal Brief to that Court. Furthermore, use of the standard that the Petitioner now prefers would not change the result.

The Petitioner next argues that review is warranted because the Eleventh Circuit required her to adduce direct evidence of a discriminatory intent. Even a cursory reading of that Court's opinion will reveal that this is simply untrue.

Finally, the Petitioner asserts that even though the Court of Appeals determined that she had presented insufficient evidence to support her claim, she should be given a new trial in order to allow her a second chance to carry her burden of proof. The Petitioner was on notice of the elements she was required to prove but intentionally pursued an erroneous theory of liability in the District Court which did not include one of those elements. The Court of Appeals correctly determined that a new trial would be an injustice.

REASONS FOR DENYING THE WRIT

I.

STANDARD OF REVIEW

The Petitioner seeks to piggy back on this Court's recent grant of certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688 (5th Cir. 1999). The Petitioner contends that, as asserted in *Reeves*, the Court of Appeals in the instant case utilized the incorrect standard of review when deciding whether the District Court erred in its ruling on the Respondents' Motions for Judgment as a matter of law pursuant to Rule 50. Moreover, the Petitioner contends there is a Circuit split over which standard should be applied.

1.

As indicated by the absence of any analysis of this issue in the Eleventh Circuit's opinion (Pet. App. A), the Petitioner never raised this issue in the Court of Appeals, even though Rule 28(b)(4) of the Federal Rules of Appellate Procedure required her to raise it in her principal brief. *Cf. Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 185 (3d Cir. 1999) (appellee suggested an alternative standard of review). She even failed to object to this standard in her Petition for Rehearing to the Court of Appeals. Under these circumstances the issue is deemed waived, thereby precluding this Court's consideration of the issue on certiorari. *Hoover v. Ronwin*, 466 U.S. 558, n.25 (1984).

2.

Yet even more notable, the Petitioner has only herself to blame for the standard that was used. At pages 13-14 of Petitioner's Principal Brief to the Court of Appeals she proffered and vouched for the following standard:

> C. Statement of Standard of Review
>
> 1. Jury Verdict and Judgment as a Matter of Law
>
> This Court will affirm a jury's verdict "if the state of the proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict . . . [T]he jury's verdict should not be disturbed if there is competent evidence in the record to support it." *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1016 (11th Cir. 1994)) (quoting *Deakle v. John E. Graham & Sons*, 756 F.2d 821, 827 (11th Cir. 1985)). "A verdict may be overturned only if the facts and inferences point so strongly and overwhelmingly in favor of one party . . . reasonable men could not arrive at a contrary verdict." *Overseas Private Investment Corp. v. Metropolitan Dade County*, 47 F.3d 1111, 1113 (11th Cir. 1995). This Court reviews a denial of a judgment as a matter of law *de novo*, but the standard is the same as that employed when reviewing a jury verdict. *Pinnacle Port Community Ass'n v. Orestein*, 952 F.2d 375, 378 (11th Cir. 1992). This Court in reviewing both the jury's verdict and the denial of judgment as a

> matter of law, *must view all evidence* in the light most favorable to Stimpson and may reverse only if it finds that no reasonable jury could have returned a verdict for Stimpson.

(Principal Brief of Appellee/Cross Appellant). In her Petition for Rehearing filed in the Court of Appeals the Petitioner expressly noted that "The panel correctly found (slip op., p.8) that the Standard of Review requires it to view the evidence in the light most favorable to Stimson (sic)", citing with approval *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198, 2000 (11th Cir. 1993), (Pet. For Reh, p.5), a case she now submits was incorrectly decided.

This Court does not and should not condone or reward a party who advocates a litigation position that that party believes to be incorrect, and then gambles on the outcome of that litigation. It should not exercise its discretion to grant review on a writ of certiorari and possibly relieve that party of its disingenuous connivance, particularly where the appellate court has adopted that party's position as its own. *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U.S. 432 (1890).

3.

That the "standard of review" issue does not amount to a "compelling" reason justifying review is demonstrated by the fact that that standard had no effect whatsoever on the outcome of the appeal. As indicated by the Court of Appeal's opinion, because the City did not make the discharge decision, the pivotal issue was whether the Petitioner had carried her burden of proving that her discharge from employment (a decision made by Respondent Civil Service

Board of Tuscaloosa, an agency of the State of Alabama which had the sole legal authority to make that decision) was *caused* by a discriminatory animus allegedly held by Respondent City of Tuscaloosa, her employer:

> Consequently, we hold that Stimpson has failed to produce sufficient evidence to allow a reasonable jury to find causation between the City's alleged discriminatory animus and the Board's decision to terminate her.

(Pet. App. A, 9a).

The Petitioner failed to adduce *any* evidence that the Board's decision was caused by the City's animus, whether legal or illegal. Instead, the evidence was undisputed that the Board had conducted an independent investigation before making its decision, and the Petitioner presented *no* evidence that the Board knew or was made aware of the existence of any improper animus on the City's behalf.

Thus, even if the Court of Appeals had limited its review to "determining only whether the non-movant's evidence supports the jury verdict . . . ," as the Petitioner now suggests (Petition, 12), it would have made the same decision. Implicit in that Court's holding is that *neither* party adduced any evidence that the Board's decision was illegally affected by any alleged animus by the City. Tellingly, the Petitioner even now does not point to any contrary evidence in her Petition. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-671 (1984) (discussing harmless error rule).

By way of contrast, in *Reeves* the plaintiff adduced evidence of age-related statements directed toward the

Plaintiff by an upper-management employee of the decision-making entity who not only participated in the discharge decision, but was married to the actual decision-maker. In reversing the verdict in favor of the plaintiff, the Fifth Circuit did not err in reviewing "all of the evidence." Instead, as the Petitioner in *Reeves* contends, it appears that the Fifth Circuit went beyond merely determining the sufficiency of the evidence. It invaded the province of the jury by weighing disputed evidence and resolving those disputes in favor of the defendant.

In the instant case, the Eleventh Circuit did not do this.

4.

The standard of review utilized by the Court of Appeals was the correct standard. Rule 50(a)(1) of the Federal Rules of Civil Procedure frames the standard for the District Court as being whether there is a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." This is the same standard applied by an appellate court in reviewing a District Court's decision of such a motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

One of the tests used by an appellate court in making this determination is whether "reasonable minds could differ as to the import of *the evidence* . . . ." *Id.*, 477 U.S. 250-251. If they could, granting the motion would be error. *Id.*

Thus, reviewing *all* the evidence has long been permitted if not required by this Court. This Court has denied certiorari regarding several Eleventh Circuit cases applying this very standard. *See, e.g., Combs v. Plantation Paterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998);

Sullivan v. National R.R. Passenger Corp., 170 F.3d 1056 (11th Cir.), *cert. denied*, 120 S. Ct. 402 (1999); *Llampallas v. Mini-Circuits Lab., Inc.*, 163 F.3d 1236 (11th Cir.), *cert. denied*, 120 S. Ct. 327 (1999).

5.

Finally, there actually is no split among the circuits on this issue. The Petitioner indicates that the Second, Fifth, Seventh and Eleventh Circuits examine "all" the evidence to determine whether a plaintiff has adduced sufficient evidence to create a jury question on a particular issue. Other circuits appear to follow this same procedure. *See, e.g., Rego v. ARC Water Treatment Co. of Pa.*, 181 F.3d 396, 400 (3d Cir. 1999); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 185 (3d Cir. 1999); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 230 (4th Cir. 1999).

Conversely, the Petitioner contends the First, Eighth and Ninth Circuits "consider only the evidence that supports the non-movant." (Petition, 13).

However, each of these circuits appear to use the same standard utilized by the Eleventh Circuit and all other circuits. *See, e.g., Wills v. Brown University*, 184 F.3d 20, 29 (1st Cir. 1999) ("our review on that issue is de novo"); *Jimenez v. Bancomercio De Puerto Rico*, 174 F.3d 36, 40 (1st Cir. 1999); *Scamardo v. Scott County*, 189 F.3d 707, 710 (8th Cir. 1999); *Dominium Management Services, Inc., v. Nationwide Housing Group*, 195 F.3d 358, 363 (8th Cir. 1999); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999); *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1057 (9th Cir. 1998).

In any event, although the standards are worded differently, there is not a "dime's worth" of difference between their application or the results they produce. Logically, in order to identify what evidence "supports the non-movant" an appellate court necessarily reviews the entire record — "all the evidence" — to identify and separate that evidence from evidence to the contrary. Thus, the standard of review issue is a "red herring" calculated merely to attempt to convince this Court that this case complies with its standards for granting certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923) (dismissing as improvidently granted a writ of certiorari which had been granted on the mistaken assumption that a circuit conflict existed).

II.

ST. MARY'S HONOR CTR. v. HICKS

Continuing her strategy to fabricate illusory parallels between the instant case and *Reeves*, the Petitioner argues that the Eleventh Circuit's reversal was because she failed to adduce direct evidence of a discriminatory intent. (Petition, 14-18). This is also untrue.

Even a cursory review of the Eleventh Circuit's opinion reveals that the true basis of its decision was the Petitioner's failure to adduce *any* evidence that the City, as opposed to the Civil Service Board, made the discharge decision, or any evidence — direct, circumstantial or otherwise — that the Civil Service Board's decision to discharge the Petitioner was motivated by her sex or was caused by the City's alleged discriminatory animus.

In particular, the Petitioner presented *no* evidence that the legitimate non-discriminatory reasons proffered by *the Civil Service Board* were in any way pretextual. Instead, she merely tried to prove that *the City*, which was not even the decision-making entity, possessed a discriminatory animus, without going a step further and showing the City's animus was the real reason for the Board's decision.

Thus, the Eleventh Circuit was not required to reach the issue posed in *Reeves* regarding whether mere proof of pretext regarding a decision-maker's proffered reasons is sufficient to create a jury issue on the ultimate fact of intentional discrimination. This is the true reason why neither *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), nor any of its Eleventh Circuit progeny, were cited in the Court's opinion.

III.

NEW TRIAL

The Petitioner's final ground for seeking discretionary review is the Court of Appeals' decision to direct entry of judgment instead of granting her a new trial. (Petition, 18-30).

This is another issue that was not raised or passed on in the court below. In particular, the Petitioner did not raise this issue in her Petition for Rehearing to the Court of Appeals. *Weisgram v. Marley Co.*, No. 99-161 (U.S. Feb. 22, 2000) (requiring grounds for new trial to be raised no later than the petition for rehearing to the Court of Appeals).

In addition, the Petitioner does not point to any circuit conflict on this issue or any other compelling reason listed in Rule 10(a) of the Rules of the Supreme Court.

In substance, the Petitioner contends that the legal standards of liability applied by the Court of Appeals to her claim were "new" and that, as a result, she failed to adduce evidence in accordance with those standards. She wants a second chance to prove her case. Significantly, she does not contend that the standards applied by the Court of Appeals were incorrect. She also does not contend that she possesses any new evidence.

The standard applied by the Eleventh Circuit was hardly new. That court summarized the essential elements of a plaintiff's Title VII claim to be that:

> In order to prove intentional discrimination under [42 U.S.C. § 2000(e)-2(a)(1)], a plaintiff must establish (1) the employer's discriminatory animus towards the employee based on the employee's protected characteristic; (2) a discharge or other significant change in the terms or conditions of employment; and (3) a causal link between the two.

(Petition App. A-6a-7a).

Controlling authority which predated the January, 1998, trial of this case dictated these elements. *See, e.g.*, 42 U.S.C. § 2000(e) (prohibiting an employer from discharging an employee "because of" the employee's sex); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (requiring proof of a discriminatory animus); *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989) (plaintiff must prove "that adverse employment action was taken against him, e.g., discharge, demotion or failure to hire . . ."); *Virgo v. Riviera Beach Assoc., Ltd.*, 30 F.3d 1350, 1362 (11th Cir. 1994)

(requiring proof of a change in an employee's conditions of employment); *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1197-1198 (11th Cir. 1997) (citing *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) and requiring proof of a causal link). *Cf, Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994) (intervening act of independent decisionmaker breaks the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure). In addition, in their Rule 50(a) motions, the Respondents raised the lack of evidence on these necessary elements. Thus, the Petitioner was on notice of these elements and had a full and fair opportunity to present her case in accordance therewith.

What the Petitioner is actually remorseful about is her utter failure to adduce *any* evidence in accordance with these standards. The only theory of liability she actually pursued at trial was premised on her erroneous and baseless assumption that the City of Tuscaloosa could be held liable under Title VII for merely recommending she be discharged, even though that decision did not in any way change the terms or conditions of her employment. In accordance with that trial strategy, she did not even attempt to demonstrate that the City's alleged discriminatory animus caused the Civil Service Board's discharge decision, or that the Board itself possessed a discriminatory animus. Thus, when she complains that the issue of the Board's motivation was not "fully developed" in the District Court (Petition, 22), she has only herself to blame.

The Petitioner argues that the District Court unduly restricted the introduction of evidence on this issue. (Petition, 26). However, the District Court *never* prevented her from introducing whatever evidence she had to establish a discriminatory animus or any other factors which motivated the Board. She simply did not offer any evidence. Therefore,

the District Court properly granted a judgment as a matter of law in the Board's favor. (R4-111-736). The Petitioner did not appeal this decision.

The only evidence barred by the District Judge was evidence favorable to the Respondents, which the Petitioner objected to because of her desire that the jury be left in the dark regarding the Board's true role in her discharge. Nonetheless, the District Judge did admit into evidence the Board's formal written decision stating in great detail the Board's reasons for discharging the Petitioner. (R4-111-716 through 736, Defendants' Exhibit 25). In addition, contrary to the Petitioner's contention (Petition, 22), the entire transcript of testimony and proceedings before the Civil Service Board regarding the Petitioner was a part of the appellate record, although it was not admitted into evidence. (*Id.*)

Thus, if the record on this issue is "incomplete" as the Petitioner now pretends, she, again, has only her own trial strategy to blame. In essence, she has hoisted herself on her own petard.

The Petitioner also claims for the first time that the District Court failed to use the standard applied by the Eleventh Circuit and that this justifies a new trial. The Petitioner did not raise this issue in the courts below. Even if she had, she has no basis for complaining because the District Court ruled in her favor. Even if it had ruled against her, there is no evidence that the District Court applied the wrong standard, as opposed to simply misapplying the correct standard. *See* Rule 10 of the Supreme Court Rules ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

However, it appears that the District Judge, who was thoroughly familiar with this area of the law, not only recognized the proper standards but charged the jury on them in an effort to fit the "round peg" of the Petitioner's misguided theory of liability into the "square hole" of settled precedent. Indeed, the Petitioner quotes from that jury charge as follows:

> [THE COURT]: As I have said, the plaintiff has the burden of proving that the defendant intentionally discriminated against her because of her sex. That is the first element of her burden of proof. In determining whether the plaintiff has carried that burden, your job is to decide just what motivated the Tuscaloosa Police Department to recommend that the plaintiff be discharged. And if you find that the plaintiff's sex was a motivating factor, *that it did make a difference*, then the plaintiff would have carried her burden of proof on the first element of her claim.

(Petition, 19-20). The Petitioner simply failed to adduce any evidence that the City's alleged animus made any difference in the Board's decisionmaking process.

Even if the District Judge had not properly charged the jury, this Court has previously held that the Seventh Amendment guarantee of jury trial does not require a remand for a new trial. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 513-514 (1988). Accord, *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967) and *Weisgram v. Marley Co., supra.* The cases cited by the Petitioner are inapposite. All are non-jury cases where the issue on appeal was the District Court's failure to make a necessary finding of fact, instead of the issue of whether sufficient evidence existed to render a verdict in favor of the

prevailing party. *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has *failed to make a finding* because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing finding"). Even in the non-jury context there is not a full blown retrial as the Petitioner herein seeks.

In sum, the Petitioner was on notice of the proper legal standard but failed to adduce evidence in accordance with that standard. Therefore, although the jury rendered a general verdict in favor of the Petitioner against the City (only), the Seventh Amendment does not prevent the Eleventh Circuit from reversing that verdict due to insufficient evidence. It was, in fact, obligated to do so. Nothing required that court to give the Petitioner a "second bite at the apple" by remanding the case for another trial.

CONCLUSION

For the reasons discussed herein above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT W. ENNIS, IV, *City Attorney*
Counsel of Record
City of Tuscaloosa,
Legal Department
P.O. Box 2089
Tuscaloosa, Alabama 35403
(205) 349-0101

C. C. TORBERT, JR.
DAVID M. SMITH
CAROLE A. GOLINSKI
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
Suite 2400
Birmingham, Alabama 35203
(205) 254-1000

Attorneys for Respondents